Supreme Court, U.S.
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No. 05-1456

In The

Supreme Court of the United States

IRA MALMED,

Petitioner,

v.

JOHN E. POTTER,
Postmaster General of the United States Agency,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Are employment actions which "do not affect job duties, compensation or benefits," actionable under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., as amended?

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for IRA MALMED certifies that this is a civil case and that the persons having an interest in the outcome of this case are the following:

JUDGE:

Honorable United States Judge Lee H. Rosenthal,
U.S. District Judge for the Southern District of Texas,
Houston Division
United States Courthouse
515 Rusk
Houston, Texas 77002

APPELLANT:

Ira Malmed
Missouri City, Texas

ATTORNEY FOR APPELLANT:

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APPELLEE:

John E. Potter,
Postmaster General of the United States Agency

ATTORNEYS FOR THE APPELLEE:

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These representations are made in order that Judges of this Honorable Court may evaluate possible disqualification or recusal pursuant to Local Rule 28.2.1.

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PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Petitioner respectfully prays that a Writ of Certiorari issue to review the final decision of the Federal Fifth Circuit Court of Appeals in this case. The Per Curiam Opinion was issued on February 21, 2006, and no motion for rehearing was filed.

OPINIONS BELOW

The Federal District Court in Houston, Texas issued a MEMORANDUM OPINION (Appendix 2-24) and a FINAL JUDGMENT on March 28, 2005. (Appendix 25) Neither has been reported.

JURISDICTION

The decision of the court of appeals was entered on February 21, 2006. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Section 703(a)(1) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1), provides, in pertinent part, "It shall be an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges

of employment, because of such individual's race, color, religion, sex, or national origin. . . ."

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

On January 21, 2003, Petitioner filed suit in the United States District Court for the Southern District of Texas, Houston Division, alleging violations of Title VII of the Civil Rights Act of 1964, as amended. (App. 27-35) Eventually Respondent filed a Motion for Summary Judgment.

On March 28, 2005, the district judge entered an Order granting Respondent's Motion for Summary Judgment holding that Petitioner had not sustained any adverse employment actions. (App. 2-24) On February 21, 2005, the court of appeals affirmed Per Curiam. (App. 1)

B. Statement of the Facts

Because the complaint in this case was dismissed as legally insufficient, at this juncture, Petitioner's factual allegations must be taken as true.

Petitioner sued the Respondent for race and religion discrimination and unlawful retaliation. He is a White Jewish male. Respondent continuously employed him since November 12, 1994, as a truck driver in Houston, Texas. His main job responsibilities involved collecting and delivering mail by truck. (App. 26-35)

Chester Cassel, Black male, was employed by the Respondent as Acting Plant Manager of Transportation

and Networks at Petitioner's place of employment. Kenneth Brown, Black male, was employed as Supervisor of Transportation Operations, and Rodolfo ("Rudy") Perez, Hispanic male, as Unit Lead Supervisor at the same location. (App. 26-35)

In the summer of 1998, an altercation erupted between Petitioner and another postal employee, Kenneth Whittaker, Black male, where Petitioner was called a "Jew" in a derogatory manner. Whittaker also assaulted Petitioner in conjunction with a disagreement related to a Juneteenth event. (App. 26-35)

Petitioner complained about Whittaker to Cassel and filed an internal EEO complaint. Petitioner also requested a transfer to avoid working with Whittaker. Whittaker was not disciplined in conjunction with the incident and, to the contrary, was subsequently promoted to Acting Supervisor. Similarly, Respondent did not investigate Petitioner's EEO complaint, rejected his affidavit, and did not transfer him. Cassel was implicated in the investigation and rejection of Petitioner's affidavit and request for a transfer. (App. 26-35)

On August 29, 1999, Petitioner reported for work, only to discover that he was not on the schedule. He spoke with Brown who asked Petitioner to load the entire dock. Petitioner pointed out that the work assignment was out of the ordinary since previously he had not been asked to load the entire dock, but only his own truck. Petitioner did not refuse to load but mentioned to Brown that he intended to file internal EEO complaints against Cassel and Perez. (App. 26-35)

Brown called the security personnel, complained that Petitioner was insubordinate, and asked that he be

removed. Petitioner explained to the security personnel that he was not insubordinate and the security personnel left without incident. (App. 26-35)

The following day, Petitioner met with Cassel regarding the incident and Cassel remarked that the security personnel should have removed Petitioner from the premises. Following this incident Cassel decided to subject Petitioner to a fitness-for-duty medical examination. Respondent's policies allowed management to subject an employee to such a test provided "justifiable doubt" existed with respect to the employee's ability to discharge his job responsibilities. (App. 26-35)

Accordingly, a medical examination was scheduled for September 20, 1999. However, September 20 was Yom Kippur, a Jewish holiday which Petitioner wished to observe, and a day which previously had been approved for him as a day off. Upon learning that Respondent had scheduled his fitness-for-duty test on his religious holiday Petitioner objected. On September 16, 1999, Respondent agreed to reschedule Petitioner's examination, provided, however, that he consented to a temporary schedule change. Petitioner was not opposed to Respondent's suggestion but protested Respondent's attempts to characterize the request for a schedule change as a request for Petitioner's personal convenience. Petitioner pointed out that the examination was work related not personal. Cassel threatened to send Petitioner home unless he consented. Petitioner complied under duress. (App. 26-35)

On September 22, 1999, Petitioner had his fitness-for-duty examination. The physician concluded that Petitioner's "concentration is good," "judgment in respect to ordinary life situations is intact," and that "both on clinical

interview and personality testing there is no evidence of any psychotic disorder." Nevertheless, the physician further concluded that "until [Petitioner] has attained a more normalized sleep pattern and normalized mood, he is not considered fit to return to unrestricted duty." (App. 26-35)

Accordingly, effective September 30, 1999, Petitioner was placed on sick leave until the end of October 1999. (App. 26-35)

On November 1, 1999, Petitioner returned to work, only to discover that his access badge had been deactivated pursuant to Cassel's instructions. Petitioner requested that the badge be reactivated. Two weeks lapsed before his request was honored. (App. 26-35)

On November 15, 1999, Cassel removed from Petitioner his driving job responsibilities alleging that Petitioner's medication altered his ability to drive. Petitioner again protested, pointing out that on October 25, 1999, his treating physician specifically advised Respondent that Petitioner's medication did not impair his driving ability. (App. 26-35)

On November 22, 1999, Petitioner was told, once again as an unprecedented occurrence, that he would be sent home, unless Respondent found work for him. (App. 26-35)

On November 28, 2000, Cassel told Petitioner he would have to undergo a third medical opinion regarding his fitness to return to work. Petitioner once again protested this unprecedented request, but complied in January 2000 after he was threatened with termination. (App. 26-35)

Petitioner filed internal EEO complaints regarding each of these incidents on January 31, 2000. He appeared pro se in all subsequent EEO proceedings. (App. 26-35)

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO DELINEATE WHAT CONSTITUTES AN ADVERSE EMPLOYMENT ACTION OR AN ULTIMATE EMPLOYMENT ACTION FOR PURPOSES OF TITLE VII

This case presents a recurring issue that faces employment litigants and courts, namely what constitutes an adverse employment action or an ultimate employment decision for purposes of Title VII. The past decisions of this Court have interpreted Title VII to imply a broad definition. Yet, courts of appeals continue to differ in their interpretation of the issue to the point of confusion and inconsistency. The Court should accept this case to eliminate confusion and ensure consistency. Confusion and inconsistency are of palpable practical importance because many of the thousands of employment discrimination cases filed around the country each year turn on the issue of what constitutes an adverse employment action or an ultimate employment decision under Title VII.

The plain wording of Title VII implies a fairly broad reading of employment-related actions that Title VII seeks to prohibit. It states, in relevant part, that "it shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise discriminate against an individual with respect to his compensation, terms, conditions, or privileges of

employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

The Court interpreted broadly this statutory provision and its holdings have been consistent. Most recently it addressed this issue in *National Railroad Passenger Corporation v. Morgan,* 122 S.Ct. 2061, 2073, 536 U.S. 101, 153 L.Ed.2d 106 (2002), stating, based on precedent of the Court, that

> We have repeatedly made clear that although [Title VII] mentions specific employment decisions with immediate consequences, the scope of the prohibition is not limited to economic or tangible discrimination, . . . , and that it covers more than terms and conditions in the narrow contractual sense. As the Court stated in *Harris,* 'the phrase terms, conditions, or privileges of employment evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment.'

(Internal citations omitted); see also, *Faragher v. City of Boca Raton,* 524 U.S. 775, 118 S.Ct. 2275, 2283 (1998).

Petitioner has argued below that the following actions taken against him are actionable: (1) the removal of his driving duties; (2) being subjected to a psychological fitness-for-duty exam without "justifiable cause"; (3) threatening to remove him from the building; (4) being compelled to go for another medical examination even though Petitioner's doctor cleared him to return to work; (5) being compelled to sign a temporary change of schedule request for personal convenience when in fact it was for the convenience of the employer; (6) the threat to remove

him from the building; (7) threatened to be sent home unless work was found for him; and (8) the threat to terminate his employment unless he went for a third medical examination, even though one was not needed.

The district judge rejected all of these incidents as not being actionable, in reliance upon the Fifth Circuit Court of Appeals' ruling in *Banks v. East Baton Rouge Parish Schoo' Board,* 320 F.3d 570, 575 (5th Cir. 2003) that an employment action that "does not affect job duties, compensation or benefits" is not an adverse employment action. (App. 19)

The Fifth Circuit Court of Appeals has repeatedly been urged to repudiate its "ultimate employment decision" doctrine as inconsistent with Supreme Court decisions, but it has refused. The Fifth Circuit Court of Appeals has long held and has never deviated from its interpretation of Title VII, that only "ultimate employment decisions" are covered by Title VII. The court's most explicit and forceful analysis of this doctrine was made in *Dollis v. Rubin,* 77 F.3d 777, 781-782 (5th Cir. 1995) and *Mattern v. Eastman Kodak Co.,* 104 F.3d 702 (5th Cir. 1997). *Mattern* was wrongly decided and it should be overruled.

The attacks on *Mattern* have been sustained, especially in the wake of the Court's ruling in *Robinson v. Shell Oil Company,* 519 U.S. 337, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997). In his dissent in *Brazoria County, Texas v. Equal Employment Opportunity Commission,* 391 F.3d 685, 696-697 (5th Cir. 2004), Circuit Judge Pickering eloquently demonstrated that *Robinson* "limited *Mattern* to some degree," by holding, for a unanimous Court, that even adverse postemployment actions by employers against employees are actionable. Under *Mattern*, even an act of

defamation occurring during employment could not be held an actionable Title VII wrong.

Similar, yet unsuccessful, attempts to revisit or reject the "ultimate employment decisions" doctrine were pursued by employees in *Watts v. Kroger, Co.* 170 F.3d 505, 510 n. 4, 411 n. 5 (5th Cir. 1999); *Burger v. Central Apartments Management, Inc.*, 168 F.3d 875, 878 n. 3 (5th Cir. 1999) ("We are not alone, but we are in the minority."); *Fierros v. Texas Department of Health*, 274 F.3d 187, 192-194 (5th Cir. 2001) ("We need not evaluate whether the 'ultimate employment decision' doctrine is undermined by the Supreme Court's recent Title VII decision."); *Zaffuto v. City of Hammond*, 308 F.3d 485, 493 (5th Cir. 2002) (unwilling to decide whether suspension of an employee for 240 hours constitutes an adverse employment decision); *Foley v. University of Houston System*, 324 F.3d 310, 317 (5th Cir. 2003) ("as of 1996, the *Dollis* definition of 'adverse employment action' as an ultimate employment decision was the clearly established law in this Circuit.").

However, the national trend, and in fact the majority view now is that even employment decisions which fall short of "ultimate employment decisions" are actionable. The view propounded by the Fifth Circuit Court of Appeals that only "ultimate employment decisions" are actionable is the extreme, minority view in Title VII jurisprudence. For instance, noting a federal circuit split on this issue, the Eleventh Circuit Court of Appeals joined the majority view in holding that Title VII's protection against discrimination extends to all adverse actions which fall short of ultimate employment decisions. Requiring otherwise, the court noted, is inconsistent with the plain language of the statute which makes it "unlawful to discriminate." The term "discriminate" is not limited to "ultimate employment decisions." This conclusion, the court noted, was

consistent with Title VII's remedial purpose. *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1457 (11th Cir. 1998); See, also, *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876 (6th Cir. 1996). The Eleventh Circuit Court of Appeals then concluded: "We join the majority of circuits which have addressed the issue and hold that Title VII's protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decision."

Wideman also pointed out the significant split which exists in American jurisprudence regarding the "ultimate employment decision" doctrine. It pointed out that as of 1998 when the decision was issued only the Fifth Circuit Court of Appeals and the Eighth Circuit Court of Appeals adopted the doctrine that only adverse employment actions which rise to the level of an ultimate employment decision are actionable under Title VII. *Ledergerber v. Stangler,* 122 F.3d 1142, 1144 (8th Cir. 1997). It also indicated that, on the contrary, the First, Ninth, and Tenth Circuit Courts of Appeals have held that Title VII's protection against retaliatory discrimination extends to adverse employment actions which fall short of ultimate employment decisions. *Wyatt v. City of Boston*, 35 F.3d 13, 15-16 (1st Cir. 1994); *Noviello v. City of Boston,* 398 F.3d 76, 89 (1st Cir. 2005) ("Although this court has never fully analyzed the question, our case law tilts noticeably toward the majority view."); *Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987); *Fielder v. UAL Corporation,* 218 F.3d 973, 984 (9th Cir. 2000); *Ray v. Henderson,* 217 F.3d 1234, 1243 (9th Cir. 2000); *Berry v. Stevinson Chevrolet,* 74 F.3d 980, 984-986 (10th Cir. 1996).

The Eleventh Circuit Court of Appeals then concluded: "We join the majority of circuits which have addressed the

issue and hold that Title VII's protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decision." *Wideman, supra,* at 1456.

The Sixth Circuit Court of Appeals, too, rejected the "ultimate employment decision standard" in *White v. Burlington Northern & Santa Fe Railway Company,* 364 F.3d 789, 801-802 (6th Cir. 2004). ("We now join the majority of other circuits in rejecting the 'ultimate employment decision' standard.")

Even the Eighth Circuit Court of Appeals has relaxed its stringent "ultimate employment decision" doctrine. *Manning v. Metropolitan Life Insurance Company, Inc.,* 127 F.3d 686, 692 (8th Cir. 1997).

The Fourth Circuit Court of Appeals follows an even more relaxed standard and has explicitly retreated from the "ultimate employment decision" doctrine. *Von Gunten v. Maryland,* 243 F.3d 858, 866 n. 3 (4th Cir. 2001) ("the ultimate employment decision is not the standard in this circuit") (precedents in the Fourth Circuit Court of Appeals "teach that conduct short of 'ultimate employment decisions' can constitute adverse employment action for purposes of § 2000e-3.") At 865.

Similarly, the Seventh Circuit Court of Appeals has also applied a less restrictive standard. *Knox v. State of Indiana,* 93 F.3d 1327, 1334 (7th Cir. 1996) ("There is nothing in the law of retaliation that restricts the type of retaliatory act that might be visited upon an employee who seeks to invoke her rights by filing a complaint.").

The Federal Circuit for the District of Columbia has made a similar holding that an employer is prohibited

from retaliating in materially adverse ways, regardless of whether the retaliatory acts affect employment. *Passer v. American Chemical Society,* 935 F.2d 322, 330-331 (D.C.Cir. 1991) (holding that an employer's cancellation of a major public symposium in a former employee's honor could be an act of retaliation under a statute that parallels Title VII's anti-retaliatory provisions).

The district judge erred in rejecting Petitioner's suit based on the Fifth Circuit Court of Appeals' ruling in *Banks, supra,* at 575, that only "ultimate employment decisions" are actionable and that an employment action which "does not affect job duties, compensation or benefits" is not an adverse employment action. (App. 19) This view is inconsistent with the rulings of this Court and conflicts with the majority view and with the established trends which hold that even employment actions which fall short of "ultimate employment decisions" are actionable.

Under *Wideman, supra,* Petitioner's complaints would be held actionable. (The court found actionable the following retaliatory actions against the employee: being improperly listed as a non-show on a day the employee was scheduled to be off; being forced to work one time without a lunch break; employee reporting for work and discovering she was not scheduled to work; undue delay by the employer to authorize medical treatment for the employee.) The incidents about which Petitioner complains would also be found actionable under *Noviello, supra* (sufficiently severe or pervasive hostile attitude toward the employee following complaint of discrimination is actionable).

All incidents about which Petitioner complains are adverse employment actions which impacted the terms

and conditions of his employment. His driving duties were removed from him. Petitioner was a driver with the Respondent and his main job function was to drive a truck. The removal of his driving job responsibilities without excuse is tantamount to being denied employment. An analogous situation would be an attorney with a suspended license.

Similarly, subjecting Petitioner to a psychological fitness-for-duty exam without "justifiable cause" was also a tangible employment action. Petitioner was off work for two (2) months. The fitness-for-duty exam encompassed the other actions as well, namely removing Petitioner from the building, the controversy surrounding his doctor's appointment on his Jewish holiday, and being compelled to go to the doctor even though Petitioner's doctor cleared him to return to work. The fitness-for-duty matter was the second such instance Cassel ever ordered. This constitutes an adverse employment action because it is tantamount to a formal disciplinary action. Formal disciplinary actions may be ultimate employment actions under *Wideman, supra,* at 1455.

Likewise, Petitioner was compelled to sign a temporary change of schedule for personal convenience, thereby incurring loss of premium pay. Loss of compensation, however slight, is an adverse employment action. Petitioner's schedule change was connected with the psychological fitness-for-duty test which was for the convenience of the Respondent, not of the employee. Similarly, Respondent not Petitioner initiated the fitness-for-duty exam. Loss of pay, missed time from work, modification or suspension of regular job duties, and undue harassment connected with the fitness-for-duty test, they all altered the terms and conditions of Petitioner's employment.

Therefore, of necessity they constitute adverse employment actions.

Cassel additionally denied Petitioner a transfer he requested after being subjected to a racist slur by Whittaker. If, as this Court has stated in *Faragher, supra,* at 2293, that an involuntary transfer without economic consequences is deemed an actionable ultimate employment action, then likewise denial of a transfer request to avoid racism logically should also be accepted as an actionable tangible employment action.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-20482 Summary Calendar

(Filed Feb. 21, 2006)

IRA MALMED,

Plaintiff-Appellant,

versus

JOHN E. POTTER, Postmaster General of the United States Agency,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas USDC No. 4:03-CV-217

Before HIGGINBOTHAM, BENAVIDES, and DENNIS, Circuit Judges. PER CURIAM:*

AFFIRMED. *See* 5TH CIR. R. 47.6.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IRA MALMED, Plaintiff,	§	
VS.	§	CIVIL ACTION NO. H-03-0217
JOHN E. POTTER, POSTMASTER GENERAL of the UNITED STATES AGENCY, Defendant.	§	

MEMORANDUM AND OPINION

(Entered Mar. 28, 2005)

Ira Malmed, a longtime employee of the United States Postal Service ("USPS"), sued John E. Potter, the Postmaster General, claiming discrimination on the basis of his race (Caucasian) and religion (Jewish) and retaliation on the basis of complaints about discrimination. (Docket Entry No. 1). Potter has moved to dismiss certain claims and for summary judgment as to the remaining claims. (Docket Entry No. 19). Malmed has replied. (Docket Entry No. 26). Based on the pleadings; the motion, response, and reply; the parties' submissions; and the applicable law, this court grants defendant's motion to dismiss and defendant's motion for summary judgment and, by separate order, enters final judgment. The reasons are stated below.

I. Background

Malmed was hired as a truck driver to work at a postal facility in Houston, Texas, collecting and delivering

mail between facilities. (Docket Entry No. 19, Ex. 21, p. 82). Malmed testified that some time in 1998, another truck driver, Kenneth Whittaker (who is African American and Baptist) told him that unless Malmed gave him money, he would report him for clocking in early. When Malmed refused, Whittaker replied "I know you have it, you're a Jew. You're a Jew, I know you have it." (Docket Entry No. 19, Ex. 21, pp.170, 176). Malmed did not report this event until after another incident with Whittaker occurred in June 1998, during employee-sponsored dinner at the postal facility. Malmed took a piece of cake from the table and Whittaker said that he had to pay the $5 charge for the dinner. Malmed refused – it was a small piece of cake – and Whittaker grabbed the cake from his hand. (*Id.*, pp. 39, 184). Malmed reported to Chester Cassel, a transportation Manager, that Whittaker had called him "Jew" months earlier and had "assaulted him" at the dinner. Cassel obtained written statements from both employees and began an investigation. There were no witnesses to the name-calling incident, and Whittaker denied it. Cassel spoke to three witnesses about the incident at the dinner. The witnesses reported that when Malmed took a piece of cake, Whittaker asked him to contribute five dollars as the other postal employees had done. Malmed refused and Whittaker took the cake from his hand. (Docket Entry No. 19, Ex. 30, pp. 36-38). Cassel reported the alleged assault incident to human resources, but did not report Malmed's allegation about the name-calling incident. (*Id.*, p. 59).

After Cassel concluded his investigation, Malmed, Whittaker, Cassel, and a union representative met for a final review on August 6, 1998. (*Id.*, p. 40). Cassel told Malmed and Whittaker that they were each partially at

fault and that he had decided not to discipline either. Cassel told Malmed not to take food from events unless he contributed. (Docket Entry No. 19, Ex. 21, p. 187). Cassel told Malmed that he could not substantiate his allegation as to the name-calling incident. Malmed requested a transfer and stated that he did not want to work with Whittaker. Cassel told Malmed that he did not have the authority to order a transfer, referred Malmed to the human resources department, and told Whittaker to stay away from Malmed. (Docket Entry No. 19, Ex. 29, Ex. 30, p. 34). Cassel stated in his deposition that employee-initiated transfers are filed with the human resources department. A manager has authority to transfer an employee to a different unit based on a complaint involving a coworker, but only on a showing of necessity or physical threats. (*Id.*, p. 55).

On September 8, 1998, Malmed filed a complaint with the USPS's Equal Employment Opportunity (EEO) office, alleging discrimination on the basis of race and religion because Cassel had told him that he was partially at fault for the cake incident with Whittaker and because Cassel did not discipline Whittaker. Malmed sought the following corrective action: "decision will be retracted; want to investicate [sic] the decision." On November 6, 1998, the agency dismissed Malmed's complaint for failure to state a claim. Malmed appealed to the agency's Office of Federal Operations and the decision was affirmed. Whittaker provided testimony before administrative judge in connection with Malmed's allegation. Malmed did not report any farther complaints about coworker harassment.

In January 1999, EEO counselors and investigators conducted an employee climate survey in Malmed's department. The survey report stated in part as follows:

> Reason for survey: During the past year there had been complaints by an employee that here had been occurances [sic] of ethnic/racial slurs towards him by other employees. He complained that this had been tolerated by his managers (unspecific as to whom). Another employee later complained about a similar problem, reporting that slurs regarding his religion had been made by employee and tolerated by management. This survey was done to determine how other employees viewed the work are in general and if a problem exists.

(Docket Entry No. 19, Ex. 4).

In December 1998, Cassel appointed Whittaker as a temporary holiday supervisor, a three-week position available during the year-end holidays. (Docket Entry No. 19, Ex. 30, p. 29-30). There is nothing in the record to suggest that Malmed applied for this position or that Whittaker treated Malmed differently than other employees while serving as temporary supervisor. Whittaker testified that he had one uneventful interaction with Malmed during the holiday season. (Docket Entry No. 19, Ex. 30, p. 36). On January 12, 1999, Malmed filed an EEO complaint alleging that in retaliation for his earlier complaint, Cassel appointed Whittaker as a temporary supervisor and denied Malmed's transfer request. Malmed stated that the appropriate corrective actions would be to fire or transfer Cassel and to fire Whittaker for the name-calling and cake incidents that were the basis of the prior, dismissed complaint. The complaint was dismissed and the dismissal was affirmed on appeal. (Docket Entry No. 19, Ex. 6-12). Malmed testified in his deposition in this lawsuit that he did not apply for a transfer because he thought that Whittaker should transfer and because he

was hoping for a favorable result from the EEO process. (Docket Entry No. 19, Ex. 21, p. 213).

On August 18, 1999, Charles Wiseman, a transportation supervisor, asked Malmed to make an additional run. Malmed refused, saying that he should not be driving because his EEO complaint had been denied and that he had not slept. Wiseman asked Malmed if he needed to clock-out to get some sleep. Malmed said that it was not necessary. Wiseman sent Cassel a letter expressing concern over Malmed's behavior and asking if he was fit for duty. In the letter, Wiseman described his conversation with Malmed:

> He had received the results from the [EEO] case by mail and felt that it was unfair because the Postal Service did not submit all of the evidence that he had given them. I asked him if he wanted to go to EAP [Employment Assistance Program] to try to help him work on the problem. He stated "no because they could not go against management." He stated that he only gets two hours sleep a night because he worries about what the Postal Service has done to him. He stated that this is not fair.

(Docket Entry No. 19, Ex. 20, 00016). Rudolfo Perez, a supervisor, sent Cassel an e-mail expressing similar concerns. Perez had also asked Malmed if he wanted EAP, which Malmed declined. (*Id.*).

On August 29, 1999, Brown asked Malmed to load mail onto the delivery dock. Malmed objected, saying that loading the dock was not his job. Malmed denies that he refused to load the dock. (Docket Entry No. 19, Ex. 21, p. 31). Malmed admits that he said that he was going to file EEO complaint against Brown and a complaint against

Cassel for promoting Brown. Brown testified that Malmed was screaming loudly and would not lower his voice. Brown reported the incident to Cassel and called another manager, Rueben Gonzales, and the security officer on duty. Gonzales arrived, talked to Malmed, and calmed him down. Malmed loaded the tracks as instructed. (Docket Entry No. 19, Ex. 31, p. 15-16). During this incident, Malmed repeated to Cassel that he was under stress about the EEO's decision, had not slept, and could not drive his truck. Cassel testified:

> In the past, there was concern from other [postal] employees about his behavior. They thought it was a little irrational because he would be just talking to himself and walking around and kicking on empty equipment which was of no real concern as long as he posed no physical threat to anyone . . . However, [one morning], he directed his behavior toward a supervisor, in this case toward [Brown]. . . . His behavior was irrational. His tone was very aggressive. In fact, he was yelling at the supervisor and he was saying that he couldn't drive. He couldn't focus. He couldn't concentrate. He might go out and have an accident. He was basically saying to me and to the supervisor that he was not fit to drive. And at that juncture, I felt compelled to bring him in and to comply with his request. I felt that . . . [h]e needed to have some medical observation, fitness for duty.

(Docket Entry No. 19, Ex. 30, pp. 79-81). Malmed does not deny that he told Cassel and others that he was not fit to drive. Malmed testified: "I asked them to remove me from driving because of discrimination." He told Brown and his coworkers: "If you don't want to see the proof of

discrimination, I should not be driving because I'm very upset." (Docket Entry No. 19, Ex. 21, pp. 26-28).

Cassel had requested other employees – who were neither white nor Jewish – to take fitness-for-duty ("FFD") exams. Cassel testified that another driver, Aldo Ray Munoz, was placed on nondriving status because of aggressive behavior and a threat against his supervisor, and later discharged. (*Id.*, Ex. 30, pp. 93-95). In his response, Malmed points out that he never threatened a supervisor. Malmed testified that Cassel scheduled the FFD exam so that Malmed would miss an EEO mediation scheduled on his race discrimination complaint. (*Id.*, Ex. 21, p. 52).

The USPS did not cut Malmed's pay, hours, or benefits while he was on nondriving status pending the FFD evaluation. Malmed alleges that after his driving duties were taken away, the USPS did not assign him any work. "They would occasionally ask me to do something, but no assignment." (Docket Entry No. 26, p. 30). Malmed does not otherwise allege discrimination in the conditions of his employment during his driving suspension.

On September 14, 1999, Dr. Gail Blakely, a contract physician for the USPS, examined Malmed and found that he was "medically qualified for modified work only" in nondriving positions. Blakely concluded that Malmed was not a threat to others, but referred him for a psychiatric evaluation. On September 16, 1999, Perez told Malmed that he had to sign a schedule change to accommodate a morning appointment for the examination. Malmed's regular work schedule was 1:30 p.m. to 10:00 p.m. The union contract required an employee to be "on the clock" while attending an FFD appointment and required the employer and the employee to document the reason for

any changes to a member's assigned work schedule. (Docket Entry No. 19, Ex. 21, p. 59-61). The psychiatric exam was originally scheduled on September 20, a Jewish holiday. Malmed stated in his deposition that nurse in the postal facility's medical unit told him that she scheduled the appointment on that day because it was the last appointment available in September.

The USPS had previously granted Malmed's request for leave. After Malmed complained about the conflict with the religious holiday, the FFD appointment was rescheduled for September 22, 1999. (Docket Entry No. 19, Ex. 21, p. 61). The form used to reschedule the appointment was filled out to show "personal convenience" as the reason for the change. (Docket Entry No. 26, Ex. 5). Malmed alleges that the USPS discriminated against him by requiring him to obtain the schedule change. He alleges the change was not for his convenience but to accommodate his religion. Malmed quotes from the back of the form the statement that an employee is not entitled to an out-of-schedule premium as a result of the change of schedule for the employee's convenience. Malmed does not allege that he was entitled to the premium. (Docket Entry No. 19, Ex. 30, p. 39).

On September 22, 1999, Dr. Theodore Pearlman, a contract psychiatrist for the USPS, examined Malmed. Pearlman diagnosed Malmed with "dsythymic depression with anxiety" and stated that he should not drive until his insomnia and impaired concentration were under control. Pearlman also found that Malmed "obsesses about what he perceived as discrimination and unfairness . . . and recognizes that it is risky for him to drive because his obsessions affect his concentration." Pearlman concluded that "before Mr. Malmed is considered fit to return to his

regular duty, he should receive psychiatric treatment. This should include anti-depressants and anxiolytic medication." (Docket Entry No. 19, Ex. 23). On September 30, 1999, Malmed was placed on sick leave until the end of October 1999.

On October 25, 1999, Malmed was examined by a private psychiatrist, Dr. Donald Hauser, who prescribed Buspar and signed a release that stating that the "patient has recovered sufficiently to return to work." (Docket Entry No. 26, Ex. 3-10). The USPS did not immediately reinstate Malmed to a driving position. Instead, Dr. Remenchik, a USPS administrative physician, requested clarification from Hauser. Remenchik sent Hauser a description of Malmed's duties and asked him to fill out a risk evaluation form. Hauser responded: "I have reviewed the job description that was sent to me. I feel that Mr. Malmed is capable of returning to his job duties. . . . Mr. Malmed was placed on Buspar 10 mg and this should not affect his driving at all." (Docket Entry No. 26, Ex. 3-8, 3-11). Cassel testified that he remained concerned about Malmed's ability to drive due to the side effects of Buspar and because Hauser's response did not provide the clarification sought. The USPS cleared Malmed for regular work duty, but did not then restore him to commercial driving activities.

When Malmed first returned to work on November 1, 1999, his access badge, which had been deactivated, was not reactivated for two weeks. (Docket Entry No. 19, Ex. 21, p. 20). On November 16, 1999, Malmed filed two EEO complaints alleging discrimination based on the deactivated badge; the schedule change he signed to avoid an appointment on the holiday; and the August 1999 incident when Brown called security. On November 22, 1999,

Malmed was still on nondriving status. He alleges that he was told he would be sent home if he could not find work to do. Malmed was not sent home that day or any other day while he was on nondriving status. Malmed stated in an EEO affidavit that he was not aware of others who had been treated differently under similar circumstances. (Docket Entry No. 26, Ex. 1).

On November 9, 1999, Remenchik had sent Malmed a letter explaining that because of the discrepancy between the treatment plan and recommendations of Pearlman and Hauser, the USPS was requesting a third opinion. The letter listed five board-certified psychiatrists, asked that Malmed choose one, and to contact Remenchik so that she could set up an appointment. On January 11, 2000, Malmed added two alleged discriminatory acts to his pending EEO charge, based on the USPS's decision to request an additional fitness-for-duty exam. Malmed requested that Cassel and Whittaker be fired or that he receive a large monetary award so that he could leave the Postal Service. (Docket Entry No. 26, Ex. 2, pp.28-29).

On January 12, 2000, Cassel, Malmed, a union representative, and a labor relations specialist met to discuss the Malmed's objections to another examination. It was agreed that Malmed would submit to a FFD exam before his driving duties were restored. Dr. Matthew Brams examined Malmed and reviewed the evaluations of Hauser and Pearlman. Brams found that Malmed's mood appeared to have stabilized and that he showed much less anxiety. (*Id.*, Ex. 3-14). On January 20, 2000, Brams notified Remenchik that he had concluded that Malmed was fit for duty, including driving. Malmed returned to unrestricted duty as a mail truck driver.

July 18, 2002, the agency's decision that there was no Title VII violation was affirmed. Malmed filed this suit on January 21, 2003.

Potter has moved to dismiss the allegations based on the first two EEO charges Malmed filed on the ground that they are time-barred. Malmed does not reply directly to the statute of limitations argument. As to all the allegations, Potter moves for summary judgment on the ground that Malmed has failed to show a *prima facie* case of discrimination based on race, religion, or retaliation because his own allegations and the undisputed evidence raise no fact issue as to whether he was subject to an adverse employment decision; whether similarly situated employees were treated more favorably; and whether USPS failed to accommodate Malmed's religion. (Docket Entry No. 19). Malmed argues that every alleged discriminatory act constitutes an adverse employment decision and emphasizes that for a time, he was suspended from driving duties. Malmed asserts that the USPS did not subject other employees to the FFD exams and schedule changes and the record provides sufficient evidence of discriminatory intent to survive summary judgment. (Docket Entry No. 26).

II. The Motion to Dismiss

A. The Statute of Limitations

Aggrieved employees must exhaust administrative remedies before filing a Title Vll action in federal court. Exhaustion occurs when a plaintiff timely files an EEO charge and receives a right to sue notice. *See Martinez v. Department of U.S. Army*, 317 F.3d 511, 513 (5th Cir. 2003); *Patrick v. Henderson*, 255 F.3d 914 (10th Cir. 2001)

(discussing administrative exhaustion requirement of postal employees). After agency's final action, the employee has the choice to appeal to the EEOC or file suit in federal court within ninety days. *See Tolbert v. United States*, 916 F.2d 245 (5th Cir.1990), The ninety-day limitation period is strictly construed. *Bowers v. Potter*, 113 Fed. Appx. 610 (5th Cir. 2004); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) (federal courts extend equitable tolling only sparingly).

B. Analysis

Malmed filed four separate complaints with the EEO office within the USPS. Potter has moved to dismiss the first two complaints of alleged discrimination because Malmed did not file suit within ninety days of receipt of the right-to-sue notice.

1. Complaint 1-G-771-0123-98

Malmed filed a formal complaint with the USPS EEO agency on September 8, 1998, alleging discrimination because Cassel found him partially responsible for the cake incident and did not discipline Whittaker. On November 6, 1998, the agency issued a Final Agency Decision (FAD) dismissing the complaint. On November 8, 1998, Malmed filed an appeal. The dismissal was affirmed on November 19, 1998. Malmed filed a request for reconsideration, which was denied on June 26, 2000.

2. Complaint 1-G-771-0026-99

On January 29, 1999, Malmed filed an EEO complaint alleging retaliation for his earlier EEO activity. The

complaint listed three acts: (1) Whittaker was promoted to acting supervisor; (2) the plant manager refused to speak to with him; (3) on December 11, 1998, he was denied a transfer. On March 12, 1999, the agency issued a FAD dismissing the first two allegations for failure to state a claim. Malmed appealed and the EEOC affirmed on November 5, 1999. Malmed then filed a request for reconsideration, which was denied on June 20, 2000. On February 17, 2000, the agency issued a final decision on the denial of transfer complaint, finding no discrimination. Malmed appealed. The dismissal was affirmed on June 23, 2000. Malmed's request for reconsideration was denied on December 8, 2000.

3. Complaints 1-G-771-00003-00 and 1-G-771-00026-00

On November 16, 1999, Malmed filed an EEO complaint alleging discrimination and retaliation based on the August 29, 1999 incident arising from the dispute over the request that he load mail on the dock. During that incident, USPS managers called security to have him removed from the postal facility. On November 16, 1999, Malmed filed a second complaint alleging discrimination and retaliation based on four events: (1) his fitness-for-duty examination was scheduled on a Jewish holiday; (2) on September 16, 1999, he was forced to sign a temporary schedule change to move the examination; (3) on November 1, 1999, his security badge did not work and he was required to call security to gain access to the postal facility; and (4) on November 22, 1999, he was told he would be sent home early if there was no work that would keep him busy. On January 11, 2000, the agency consolidated the two complaints into a single complaint. On February 8,

2000, Malmed added two discriminatory acts to his complaint: (1) his driving duties were suspended and (2) on January 12, 2000, he was forced to attend a fitness-for-duty exam. On May 24, 2001, an EEO administrative judge issued a decision finding no discrimination on the basis of race, religion, or retaliation; the agency adopted the opinion and issued a final order on July 17, 2001. The dismissal was affirmed on July 18, 2002. Malmed's request for reconsideration was denied on October 30, 2002.

Malmed filed this suit on January 21, 2003. The EEOC had denied Malmed's requests for reconsideration on the first two complaints by December 2000. Malmed filed suit long after the limitations period had run. The record discloses no basis for equitable tolling or for the application of the continuing violation doctrine, given the discrete nature of the events he alleges. Equitable tolling applies "when a plaintiff's unawareness of his ability to bring a claim – either unawareness of the facts necessary to support a discrimination charge or unawareness of his legal rights – is due to defendant's misconduct." *See Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1215 (5th Cir.1992). The first two complaints were limited to discrete incidents in 1998. The USPS EEO agency addressed the complaint of discrimination and of alleged retaliation. The record shows that Malmed was well aware of the EEO process and decisions. The motion to dismiss the claims that were the subject of the first two EEO decisions is granted.

III. The Motion for Summary Judgment

A. The Applicable Legal Standards

In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the Supreme Court reviewed the burden-shifting framework that governs discrimination claims. To sustain a claim under this framework, the plaintiff must first establish a *prima facie* case of discrimination. *Reeves*, 530 U.S. at 142. A *prima facie* case can generally be satisfied if the plaintiff (1) is a member of a protected class; (2) was qualified for his position; (3) was subjected to an adverse employment action; and (4) was treated less favorably than someone outside the protected class. *See Ward v. Bechtel Corp.*, 102 F.3d 199, 202 (5th Cir. 1997); *Vaughn v. Edel*, 918 F.2d 517, 521 (5th Cir. 1990); *see also, McDonnell Douglas v. Green*, 411 U.S. 792, 802 & n.13 (1973). If the plaintiff establishes a *prima facie* case of discrimination, the burden then shifts to the employer to produce evidence that its actions were justified by a legitimate, nondiscriminatory reason. *Reeves*, 530 U.S. at 142. This burden of production "can involve no credibility assessment." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993). Finally, the burden then shifts back to the plaintiff to show by a preponderance of the evidence that the employer's nondiscriminatory explanation is pretextual. *Reeves*, 530 U.S. at 143. "[S]uch a showing by the plaintiff will [not] always be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a *prima facie* case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder would conclude that the action was discriminatory." *Reeves*, 530 U.S. at 148. At all times, the plaintiff retains the ultimate burden of persuasion. *See Burdine*, 450 U.S. at 253.

Once a Title VII case reaches the pretext stage, the question on summary judgment is whether there is a conflict in substantial evidence to create a jury question regarding discrimination. *See Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 993 (5th Cir. 1996) (noting that once a Title VII case reaches the pretext stage, the sufficiency of the evidence test is applied); *Schackelford v. Deloitte & Touche, L.L.P.*, 190 F.3d 398, (5th Cir. 1999). The issue is whether the evidence, viewed in the light most favorable to the plaintiff, is sufficient to create a jury question regarding discrimination.

Retaliation claims use the same burden shifting approach. There are three elements to a *prima facie* case of retaliation under Title VII: (1) that the plaintiff engaged in activity protected by Title VII, (2) that an adverse employment action occurred, and (3) that a causal link existed between the protected activity and the adverse action. *See, e.g., Evans v. City of Houston*, 246 F.3d 344, 352 (5th Cir. 2001). This court has determined that only "ultimate employment decisions," "such as hiring, granting leave, discharging, promoting, and compensating" satisfy the "adverse employment action" element of a prima facie case of retaliation. *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1995) (citation omitted). "'[I]nterlocutory or mediate' decision[s] which can lead to an ultimate decision" are insufficient to support a prima facie case of retaliation. *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 708 (5th Cir. 1997). Put differently, the "ultimate employment decision" doctrine requires that actionable adverse employment actions "have more than a 'mere tangential effect on a possible future ultimate employment decision.'" *Mota v. Univ. of Tex. Houston Health Sci. Ctr.*, 261 F.3d

512, 519 (5th Cir. 2001) (quoting *Walker v. Thompson*, 214 F.3d 615, 629 (5th Cir. 2000)).

To establish a *prima facie* case of religious discrimination under Title VII, a plaintiff must prove that: (1) he had a bona fide religious belief that conflicted with an employment requirement; (2) that he informed the employer of his belief; (3) and that he was disciplined or suffered an adverse employment decision because of his failure to comply with the conflicting employment requirement. *Weber v. Roadway Express*, 199 F.3d 270, 273 (5th Cir.2000). "Once the [employer] establishes that it offered [plaintiff] a reasonable accommodation, even if the alternative is not [his] preference, [it has], as a matter of law, satisfied [its] obligation under Title VII." *Bruff v. North Miss. Health Servs.*, Inc., 244 F.3d 495, 500 n. 9 (5th Cir.2001); *see also Equal Employment Opportunity Commission v. Universal Manufacturing Corp.*, 914 F.2d 71, 73 (5th Cir.1990) ("Offered an accommodation [that is reasonable], the employee cannot insist upon a specific or more beneficial one."). Simply because the proposed accommodation would involve some cost to the employee does not make it unreasonable. *Bruff*, 244 F.3d n.24 (citing *Eversley v. MBank Dallas*, 843 F.2d 172, 176 (5th Cir.1988)).

B. Analysis

Malmed alleges discrimination based on the following events: on August 29, 1999, Brown threatened to have security remove him from the building; a fitness-for-duty exam was scheduled for September 20, 1999, a Jewish holiday; he was forced to sign a temporary schedule change; his driving duties were stripped after the fitness-for-duty

examination; when he was medically cleared to return to duty, his access card did not work and the USPS failed to reactivate it for two weeks; on November 22, 1999, he was told he would be sent home if there was no work to do; he was required to submit to another fitness-for-duty exam.

Potter asserts that Malmed's claims of discrimination and retaliation are not actionable because they do not meet the Fifth Circuit's standard of an "ultimate employment decision." *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1995) (per curiam); *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir.) (quoting *Dollis*, 77 F.3d at 782), *cert. denied*, 522 U.S. 932 (1997) (ultimate employment decisions include hiring, granting leave, discharging, promoting, and compensating). Malmed asserts that Potter's definition of an "ultimate employment decision" is inconsistent with recent Supreme Court decisions and argues that all the actions taken by the USPS constitute adverse employment actions. *See Fierros v. Tex. Dept. of Health*, 274 F.3d 187, 192 n. 2 (5th Cir. 2001) (noting that the Supreme Court sets out a relatively broad definition of "tangible employment action": a significant change in status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits).

Since *Fierros*, the Fifth Circuit has emphasized that an employment action that "does not affect job duties, compensation or benefits" is not an adverse employment action. *Banks v. East Baton Rouge Parish Sch. Bd.*, 320 F.3d 570, 575 (5th Cir. 2003) (quoting *Hunt v. Rapides Healthcare Sys., LLC*, 277 F.3d 757, 769 (5th Cir. 2001)). Most of the actions Malmed challenges are not, as a matter of law, actionable employment decisions because they have no affect on his employment conditions or

status. There is no competent summary judgment evidence that when Malmed filled out a form to reschedule his medical appointment to avoid the religious holiday, he lost pay that he otherwise would have received. The scheduling requirements were imposed by the union contract and filling out the schedule change form did not affect the conditions of *Malmed's* employment. The delay in reactivating his badge did not affect his employment status. The warning that he would be sent home early if he did not have work to do did not affect his employment status or conditions. *See Messer v. Meno*, 130 F.3d 130, 140 (5th Cir.), *cert. denied*, 525 U.S. 1067 (1997) (discipline and criticism not actionable); *Watts v. Kroger Co.*, 170 F.3d 505, 511 (5th Cir. 1999) (change to work schedule is not adverse employment decision); *Burger v. Cent. Apartment Mgmt.*, 168 F.3d 875, 878 (5th Cir. 1999) (denial of lateral transfer request is not an adverse employment decision).

Malmed cites *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), a hostile work environment case, and argues that although he did not suffer an ultimate employment decision, the law does not require such a strict showing.

> [A]lthough [Title VII] mentions specific employment decisions with immediate consequences, the scope of the prohibition is not limited to "economic" or "tangible" discrimination . . . and that it covers more than "terms" and "conditions" in the narrow contractual sense. . . .

Id. at 116. Malmed focuses on the decision to suspend his driving duties pending the results of the fitness-for-duty evaluation and the "undue harassment" caused by scheduling the appointment. The suspension did result in a temporary reassignment with different responsibilities.

Unwanted reassignment may constitute an ultimate employment decision. *Walker v. Thompson*, 214 F.3d 615, 629 (5th Cir. 2000).

Malmed was placed on nondriving status after he told Cassel that he could not drive, and after other supervisors had expressed concern about his medical fitness for duty. Malmed had complained of insomnia and that he was "very upset." The USPS scheduled an fitness-for-duty examination and placed Malmed on nondriving status, with full pay, hours, and benefits pending that examination. The examination resulted in a determination that Malmed was unfit for work. After treatment, he was able to resume work in November 1999, then resume driving duties in January 2000.

Even assuming that the temporary suspension was adverse employment action, there is no disputed fact issue material to determining pretext. Malmed did not deny telling Cassel that he was not fit to drive. Pearlman, the USPS psychiatrist, found Malmed unfit for a driving position. Malmed asserts that the only other postal employee Cassel ordered fitness-for-duty evaluation for was Aldo Munoz, a Hispanic employee. Unlike Malmed, Munoz had threatened his supervisor. There is no other evidence as to Munoz's situation and the fact that he had threatened his supervisors does not raise a triable issue of fact that Malmed was subjected to discrimination.

Malmed alleges that the USPS did not have "justifiable cause" to request another FFD exam after his personal physician prescribed antidepressants and released him for regular work but offers no evidence in support of discrimination. The summary judgment evidence shows that the USPS had a legitimate nondiscriminatory reason

for the additional examination before releasing Malmed to resume driving duties. Malmed had only been taking the medication for a short time. Cassel was concerned because one of the side effects of the antidepressant was impaired ability to react and Malmed drove a large truck with a tractor trailer. The USPS's decision to seek a third opinion does not raise a disputed fact issue as to pretext. Malmed has failed to show any disputed facts supporting his claim that Cassel did not actually believe the medication posed a potential threat. The USPS had a legitimate reason to believe – both before and after Malmed began his medication – that he could not safely perform his driving duties. "The question is not whether an employer made an erroneous decision; it is whether the decision was made with discriminatory motive." *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1091 (5th Cir. 1995). The fact that it was later determined that Malmed's private physician was correct in his evaluation and that Malmed could have returned to driving before the USPS allowed him to, does not create a triable issue of fact as to discrimination or retaliation. As a matter of law, no rational fact finder could conclude that the USPS discriminated or retaliated against Malmed in suspending him temporarily from driving duties based on medical concerns.

Malmed fails to allege or present evidence that he was treated less favorably than other, nonwhite, nonJewish employees.[1] He alleges disparate treatment, but fails to

[1] Most of Malmed's allegations are not grounded in any comparison with other employees. During his deposition, Malmed described the basis for his claim that he was subject to discrimination when Brown called security:

> Q: What other truck drivers who were on nondriving status were treated more favorably than you on August 29th?

(Continued on following page)

present evidence that he was treated differently "under nearly identical circumstances." *Wyvill v. United Cos. Life Ins. Co.*, 212 F.3d 296, 304 (5th Cir.2000) (citations omitted). Malmed testified that Cassel "did not subject any blacks to go to any doctors. He only subjected me to do it." (Docket Entry No., p. 126, 127-29). This testimony does not present any basis to conclude that similarly situated individuals outside the protected class were treated differently.

The summary judgment record does not present a triable issue of fact as to whether Malmed was subjected to discrimination based on his religion. Malmed's religious discrimination claim is based primarily on the same acts that give rise to his allegation of race discrimination. Malmed does not allege or present summary judgment evidence that he was denied the opportunity to practice or

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A: . . . I'm not sure anyone was treated like me. . . . I'm not sure who else was on nondriving status . . . I cannot tell you.

Q: Are you contending you were denied any benefits on August 29th?

A: No.

Q: Are you contending that you were discriminated against on the basis of retaliation of the 29th?

A: Yes. [Cassel retaliated] by having security called to remove me from the building when I never refused to follow instructions.

Q: Are you contending that you were discriminated against on the basis of religion?

A: Yes. Race and religion. I believe Brown [discriminated against me on the basis of religion]. . . . He just, I guess – I'm not sure if he did it – okay. Just the way he speaks to me, the way he spoke to me and when he called security . . .

Q: Is that the only example you have?

A: Yes.

(Docket Entry No. 19, Ex. 21, p. 46).

observe his religion. Malmed had requested leave for Jewish holidays throughout his employment and had never been denied a request. (Docket Entry No. 19, Ex. 21, p. 60). Malmed testified that there was no USPS employment requirement that conflicted with his religion and that he was not disciplined other than being required to go to the doctor. (*Id.*, p. 54). When he was scheduled for a psychiatric evaluation on a Jewish holiday, he was able to reschedule it on request. The nurse in the medical unit did not know Malmed had requested leave and the September 20th appointment was the last appointment available for that month. Malmed's allegation that it was generally known at the postal office that he was Jewish does not support an inference discrimination.

This court concludes that Malmed's discrimination and retaliation claims fail.

IV. Conclusion

This court grants Potter's motion for summary judgment. Final judgment is entered by separate order.

SIGNED on March 27, 2005, at Houston, Texas.

/s/ Lee H. Rosenthal
Lee H. Rosenthal
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IRA MALMED,	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION NO. H-03-0217
	§	
JOHN E. POTTER, POSTMASTER GENERAL of the UNITED STATES AGENCY	§	
	§	
	§	
	§	
Defendant.	§	

FINAL JUDGMENT

(Filed Mar. 28, 2005)

For the reasons stated in this court's Memorandum and Opinion entered this date, this civil action is DISMISSED with prejudice. Plaintiff is to pay reasonable costs of court.

This is a FINAL JUDGMENT.

SIGNED on March 27, 2005, at Houston, Texas.

/s/ Lee H. Rosenthal
Lee H. Rosenthal
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IRA MALMED,	§	
Plaintiff	§	
	§	
v.	§	CA NO.: H: H-03-0217
JOHN E. POTTER,	§	
POSTMASTER GENERAL OF	§	
THE UNITED STATES AGENCY	§	
Defendant	§	

PLAINTIFF'S ORIGINAL COMPLAINT

(Filed Jan. 21, 2003)

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, IRA MALMED, Plaintiff and complains of JOHN E. POTTER, POSTMASTER GENERAL OF THE UNITED STATES AGENCY, Defendant, and for causes of action would show unto the court the following:

I.

JURISDICTION

1. This Court has jurisdiction over the subject matter of this lawsuit pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 USC Section 2000e et seq., and pursuant to 29 CFR Section 1614.408.

II.

PARTIES

2. Plaintiff is an individual residing in Fort Bend County, Texas.

3. Defendant John E. Potter is the Postmaster General of the United States Postal Service and, therefore, a Head of Agency.

4. Defendant, John E. Potter, Postmaster General of the United States Agency, may be served with summons and complaint at 475 L'Enfant Plaza, South-West, Room 10022, Washington, D.C. 20260-6100.

III.

VENUE

5. Venue of this action is proper in this judicial district because the parties reside or transact business in this judicial district, the actions, events, and developments which gave rise to the causes of action outlined in this complaint took place in this judicial district, and the causes of action themselves accrued in this judicial district.

IV.

NATURE OF SUIT AND PROCEEDINGS

6. This is a Title VII action involving allegations of race and religion discrimination and unlawful retaliation. Plaintiff previously pursued these claims against the Defendant before an administrative judge in accordance with 29 C.F.R. Section 1614.

7. In accordance with the applicable federal regulations, a hearing was held before the adminsitrative [sic] judge on November 2, 2000. Testimony was taken, and on May 24, 2001 the administrative judge issued a "Decision"

stating that he found "no discrimination on the basis of race, religion, or reprisal."

8. On July 17, 2001 the United States Postal Service issued its Notice of Final Action pursuant to 29 C.F.R. Part 1614.110(a).

9. Plaintiff timely appealed on August 15, 2001 to the Director, Office of Federal Operations, Equal Employment Opportunity Commission.

10. July 18, 2002 Carlton M. Madden, Director, Office of Federal Operations issued a Decision rejecting Plaintiff's appeal.

11. On July 29, 2002 Plaintiff timely filed a Request for Reconsideration with the Office of Federal Operations.

12. On October 30, 2002 the Office of Federal Operations issued a Denial of Request for Reconsideration and advised the Plaintiff that he had the right to file a civil action in the United States District Court within ninety (90) days of his receipt of the Denial.

13. Plaintiff now timely files this action within ninety (90) days of his receipt of the Denial, as provided for in 29 C.F.R. Section 1614.408.

14. Similarly, Plaintiff will advise the U.S. Equal Employment Opportunity Commission of the filing of this action, once it is filed, as provided for in 29 C.F.R. Section 1614.410.

V.

FACTS

15. Plaintiff is a White Jewish male.

16. Defendant continuously employed the Plaintiff since November 12, 1994 as a truck driver at the Barbara Jordon Postal Facility in Houston, Texas. Plaintiff's main job responsibilities involved collecting and delivering mail by truck.

17. At all times relevant to this lawsuit Chester Cassel, Black male, was employed by the Defendant as Acting Plant Manager of Transportation and Networks. Similarly, Kenneth Brown, Black male, was employed as Supervisor of Transportation Operations, and Rodolfo ("Rudy") Perez, Hispanic male, was employed as Unit Lead Supervisor.

18. In the summer of 1998 an altercation erupted between the Plaintiff and another postal employee, Kenneth Whittake [sic], Black male, where Plaintiff was called a "Jew" in a derogatory manner. Whittaker also assaulted the Plaintiff in conjunction with a disagreement related to a Juneteenth event.

19. Plaintiff complained about Whittaker to Cassel and filed an internal EEO complaint. Plaintiff also requested a transfer to avoid working with Whittaker. However, Whittaker was not disciplined in conjunction with the incident and, to the contrary, was subsequently promoted to Acting Supervisor. Similarly, Defendant did not investigate Plaintiff's EEO complaint, rejected Plaintiff's affidavit, and did not transfer the Plaintiff. Cassel was implicated in the investigation and rejection of Plaintiff's affidavit and request for a transfer.

20. On August 29, 1999 Plaintiff reported for work, only to discover that he was not on the schedule. He spoke with Perez who asked the Plaintiff to load the entire dock. Plaintiff pointed out that the work assignment was out of

the ordinary since previously he had not been asked to load the entire dock, but only his truck. However, Plaintiff did not refuse to load but mentioned to Perez that he intended to file internal EEO complaints against Cassel and Perez.

21. Perez called the security personnel, complained that Plaintiff was insubordinate, and asked that he be removed. Plaintiff explained to the security personnel that he was not insubordinate and the security personnel left without incident.

22. The following day Plaintiff met with Cassel regarding the incident and Cassel remarked that the security personnel should have removed Plaintiff from the premises.

23. Following this incident Cassel decided to subject the Plaintiff to a fitness for duty medical examination. Defendant's policies allow management to subject an employee to such a test provided "justifiable doubt" exists with respect to the employee's ability to discharge his job responsibilities.

24. Accordingly, a medical examination was scheduled for September 20, 1999. However, September 20 was Yom Kippur, a Jewish holiday which Plaintiff wished to observe, and a day which previously had been approved for him as a day off.

25. Upon learning that Defendant had scheduled his fitness for duty test on his religious holiday Plaintiff objected. On September 16, 1999 Defendant agreed to reschedule Plaintiff's examination, provided, however, that Plaintiff consented to a temporary schedule change. Plaintiff was not opposed to Defendant's suggestion but

protested Defendant's attempts to characterize the request for a schedule change as a request for Plaintiff's personal convenience. Plaintiff pointed out that the examination was work related not personal. Cassel threatened to send the Plaintiff home unless he consented. Plaintiff compiled under duress.

26. On September 22, 1999 Plaintiff had his fitness for duty examination. The physician concluded that Plaintiff's "concentration is good," "judgment in respect to ordinary life situations is intact," and that "both on clinical interview and personality testing there is no evidence of any psychotic disorder." Nevertheless, the physician further concluded that "until [Plaintiff] has attained a more normalized sleep pattern and normalized mood, he is not considered fit to return to unrestricted duty."

27. Accordingly, effective September 30, 1999 Plaintiff was placed on sick leave until the end of October 1999.

28. On November 1, 1999 Plaintiff returned to work, only to discover that his access badge had been deactivated pursuant to Cassel's instructions. Plaintiff requested that the badge be reactivated. Two weeks lapsed before his request was honored.

29. On November 15, 1999 Cassel removed from the Plaintiff his driving job responsibilities alleging that Plaintiff's medication altered his ability to drive. Plaintiff again protested, pointing out that on October 25, 1999 his treating physician specifically advised the Defendant that Plaintiff's medication did not impair his driving ability.

30. On November 22, 1999 Plaintiff was told, once again as an unprecedented occurrence, that he would be sent home, unless Defendant found work for him.

31. On November 28, 2000 Cassel told the Plaintiff he would have to undergo a third medical opinion regarding his fitness to return to work. Plaintiff once again protested this unprecedented request, but complied in January 2000 after he was threatened with termination.

32. Plaintiff filed internal EEO complaints regarding each of these incidents on January 31, 2000. He appeared pro se in all subsequent proceedings and, as detailed above, on October 30, 2002 he was issued a right to sue by the Office of Federal Operations.

VI.

PLAINTIFF'S CAUSE OF ACTION FOR TITLE VII DISCRIMINATION

33. Plaintiff realleges all factual allegations made above and would show that Defendant is liable to him for discrimination in employment based on race and religion under Title VII of the Civil Rights Act of 1964, as amended.

34. At all times relevant to this lawsuit Plaintiff was, on account of his race and religion, a member of a protected class. Defendant treated the Plaintiff less favorably in the terms and conditions of his employment than its similarly situated employees because of his protected status. This discrimination is the proximate cause of both economic and mental damages suffered by the Plaintiff.

35. Plaintiff satisfied all jurisdictional and procedural prerequisites for bringing this cause of action.

VII.

PLAINTIFF'S CAUSE OF ACTION
FOR TITLE VII RETALIATION

36. Plaintiff realleges all factual allegations detailed above and would show that Defendant is further liable to him for unlawful retaliation in violation of Title VII of the Civil Rights Act of 1964, as amended.

37. Plaintiff's EEO activities in 1998 and 1999 constituted engagement in protected activities for which no retaliation was allowed. Defendant unlawful [sic] retaliated against the Plaintiff in the terms and conditions of his employment because of his engagement in protected EEO activities. As such, Defendant has become liable to the Plaintiff for unlawful retaliation.

38. Defendant's retaliatory actions proximately caused the Plaintiff both economic and mental damages.

39. Plaintiff satisfied all jurisdictional and procedural prerequisites for bringing this cause of action.

VIII.

40. Defendant's refusal to abide by its obligations has made it necessary for Plaintiff to employ the undersigned attorney to litigate his claims. As such, Plaintiff requests this Court to award a reasonable fee for the attorney's services rendered and to be rendered herein under both customary and statutory law.

IX.

DAMAGES

41. Plaintiff is now suffering and will continue to suffer irreparable injury, monetary, emotional, actual, consequential, liquidated, and compensatory damages as a result of Defendant's wrongful actions unless and until this court grants relief.

42. Defendant's injurious actions against Plaintiff were done maliciously or with reckless disregard for Plaintiff's rights and, therefore, Plaintiff requests the court to allow exemplary damages against the Defendant.

X.

JURY REQUEST

43. Plaintiff requests a trial by jury.

XI.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Plaintiff Ira Malmed prays that Defendant John E. Potter, Postmaster General of the United States, be cited to appear and answer and that on final trial Plaintiff be granted relief as follows:

1. Judgment declaring that the acts and practices describe herein violate Title VII of the Civil Rights Act of 1964, as amended, 42 USC Section 2000e et seq.;

2. Judgment enjoining and permanently restraining these violations;

3 Judgment against the Defendant in excess of the minimum jurisdictional limits of this court;

4. An award of actual, consequential, liquidated, compensatory and exemplary damages on all counts;

5. Costs of suit and reasonable attorney's fees;

6. Prejudgment and postjudgment interest as provided by law;

7. Such other and further relief in law or in equity, to which Plaintiff may be justly entitled.

Respectfully submitted,

BY: /s/ [Illegible]

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(2)

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No. 05-1456

In the Supreme Court of the United States

IRA MALMED, PETITIONER

v.

JOHN E. POTTER, POSTMASTER GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below correctly awarded summary judgment against petitioner on his claims that he was subjected to actionable discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

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In the Supreme Court of the United States

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JOHN E. POTTER, POSTMASTER GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1) is not published in the *Federal Reporter* but is *reprinted in* 167 Fed. Appx. 994. The opinion of the district court (Pet. App. 2-24) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 2006. The petition for a writ of certiorari was filed on May 12, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Postal Service hired petitioner as a truck driver at a postal facility in Houston, Texas. Pet. App. 2. In 1998, a co-worker, Kenneth Whittaker, allegedly called petitioner a "Jew" and "assaulted" him by grabbing a

piece of cake from his hand at an employee-sponsored dinner. *Id.* at 3. Petitioner reported those incidents to Chester Cassel, the transportation Manager. *Ibid.* After an investigation, Cassell determined that petitioner and Malmed were each partially to blame for the cake incident, and that petitioner's name-calling claim could not be substantiated. *Id.* at 3-4. Cassel did not discipline either employee. *Id.* at 4. When petitioner requested a transfer, Cassel referred him to the human resources department. *Ibid.* Cassel also told Whittaker to stay away from petitioner. *Ibid.*

On September 8, 1998, petitioner filed an Equal Employment Opportunity (EEO) complaint with the Postal Service, alleging that Cassel's handling of the cake incident and his failure to discipline Whittaker were based on race and religion. Pet. App. 4. The Postal Service dismissed the complaint for failure to state a claim, and the Postal Service's Office of Federal Operations affirmed that dismissal. *Ibid.*

In January 1999, petitioner filed another EEO complaint alleging that in retaliation for his earlier complaint, Whittaker was promoted to temporary supervisor, petitioner's plant manager refused to speak with him, and petitioner was denied a transfer. Pet. App. 5, 14. The first two actions were dismissed for failure to state a claim, and the transfer claim was denied on the merits. *Id.* at 14. The EEOC affirmed the Postal Service's decisions, and petitioner's requests for reconsideration were denied. *Ibid.*

On August 18, 1999, Charles Wiseman, a transportation supervisor, asked petitioner to make an additional run in his truck. Pet. App. 6. Petitioner refused to do so, and asserted that he should not be driving because the Postal Service had denied his EEO complaint and he

had not slept. *Ibid.* Wiseman expressed concern about petitioner's behavior to Cassel, and questioned whether petitioner was fit for duty. *Ibid.* Supervisor Rudolfo Perez expressed similar concerns to Cassel. *Ibid.*

On August 29, 1999, Kenneth Brown, another supervisor, asked petitioner to load mail onto the delivery dock. Pet. App. 6. Petitioner objected, stating that it was not his job, but petitioner claims that he did not refuse to load mail onto the dock. *Ibid.* Petitioner told Brown that he was going to file an EEO complaint against him and against Cassel for promoting Brown. *Id.* at 6-7. According to Brown, petitioner was screaming loudly. *Id.* at 7. Brown reported the incident to Cassel, and called a Postal Service manager and the security officer on duty. *Ibid.* According to Cassel, petitioner's tone was "very aggressive," and petitioner was "yelling at the supervisor" and "saying that he couldn't drive." *Ibid.* The manager calmed petitioner down, and petitioner loaded the truck. *Ibid.* Petitioner told Cassel that he was under stress because of the denial of his EEO complaint, that he had not slept, and that he was not fit to drive his truck. *Ibid.*

Cassel scheduled Malmed for a fitness-for-duty exam, and removed him from his driving duties pending the exam. Pet. App. 7-8. Petitioner's pay, hours, and benefits remained the same. *Id.* at 8. On September 14, 1999, Dr. Gail Blakely, a Postal Service contract physician, performed the exam. *Ibid.* Dr. Blakely found that petitioner was qualified only for non-driving positions. *Ibid.* Dr. Blakely also referred petitioner for a psychiatric evaluation, which the Postal Service originally scheduled for September 20, 1999, a Jewish holiday. *Id.* at 8-9. Petitioner complained, and the Postal Service changed the evaluation to September 22, 1999. *Id.* at 9.

Petitioner also complained that he asked for the schedule change to accommodate his religion, but the form used to reschedule the examination indicated that the change was for "personal convenience." *Ibid.* Although petitioner noted that employees were not entitled to premium pay when a schedule change was for personal convenience, he did not allege that he was entitled to such a premium. *Ibid.*

After examining petitioner, Dr. Theodore Pearlman, a Postal Service contract psychiatrist, stated that petitioner should not drive until he could control his insomnia and impaired concentration. Pet. App. 9. Dr. Pearlman also concluded that before petitioner could be considered fit for duty, he should receive psychiatric treatment and medication. *Id.* at 9-10. On September 30, 1999, the Postal Service placed petitioner on sick leave until the end of October 1999. *Id.* at 10.

On October 25, 1999, Dr. Donald Hauser, a private psychiatrist, examined petitioner, prescribed medication, and expressed his opinion that petitioner could return to work. Pet. App. 10. The Postal Service requested that Dr. Hauser fill out a risk evaluation form, but Dr. Hauser simply reiterated his opinion that petitioner was capable of returning to his regular duties, and stated that the medication he prescribed would not affect petitioner's driving. *Ibid.*

Petitioner returned to work on November 1, 1999. Pet. App. 10. His access badge, which had been deactivated, was not reactivated for two weeks. *Ibid.* Although the Postal Service cleared petitioner for regular work duty, it did not immediately restore his commercial driving duties. *Ibid.* Cassel continued to be concerned about petitioner's ability to drive because of the side effects of his medication, and because Dr. Hauser had

not provided the clarification that the Postal Service sought. *Ibid.* Because the private psychiatrist and the Postal Service's psychiatrist disagreed on petitioner's fitness to drive, the Postal Service sent petitioner a letter requesting that he choose one of five listed psychiatrists to examine him. *Id.* at 11. Although petitioner alleges that he was told he would be sent home if he could not find work to do, he was not sent home that day or any other day before he resumed his driving duties. *Ibid.*

Petitioner filed EEO complaints in November 1999 and in January 2000, alleging that the Postal Service discriminated and retaliated against him through a series of actions. Pet. App. 14. Petitioner identified the following actions as discriminatory or retaliatory: (1) calling security when he refused to load mail on the delivery dock, (2) requiring him to sign a schedule change in order to avoid having his fitness-for-duty exam on a Jewish holiday, (3) failing to activate his badge immediately when he returned to work, (4) keeping him on non-driving status when he returned to work, (5) telling him that he would be sent home from work if he could not find anything to do, and (6) requiring him to undergo another fitness-for-duty exam prior to restoring driving duties. *Id.* at 14-15.

On January 12, 2000, Cassel, petitioner, a union representative, and a labor relations specialist agreed that petitioner would submit to a fitness-for-duty exam before he could resume his driving duties. Pet. App. 11. On January 20, 2000, the doctor who conducted the exam notified the Postal Service that he had found that petitioner was fit for duty. *Ibid.* Accordingly, the Postal Service restored petitioner's driving duties. *Ibid.*

2. On January 21, 2003, petitioner filed suit in federal district court. Pet. App. 12. The Postal Service moved to dismiss as time-barred petitioner's claims relating to his first two EEO complaints *Id.* at 12-14. The Postal Service moved for summary judgment on petitioner's remaining claims. *Id.* at 12. The district court granted both the Postal Service's motion to dismiss and its motion for summary judgment. *Id.* at 12-25.

The court dismissed the claims in petitioner's first two EEO complaints as time-barred because petitioner filed suit more than two years after the administrative dismissal of such claims became final. Pet. App. 15. The court further ruled that the Postal Service was entitled to summary judgment on petitioner's remaining claims. The court determined that most of the challenged actions were not adverse employment actions because they had no effect on his employment conditions or employment status. *Id.* at 19-20. In particular, the court held that the delay in reactivating petitioner's badge, the warning that he would be sent home if he did not find work, and the notation that petitioner's medical appointment was rescheduled for petitioner's "personal convenience" fell into that category. *Id.* at 20.

The court assumed without deciding that petitioner's suspension from driving duties together with the requirement that he undergo an additional fitness-for-duty exam prior to resuming such duties constituted an adverse employment action. Pet. App. 20-21. The court nonetheless granted summary judgment on that issue, because the evidence established that the Postal Service had a legitimate nondiscriminatory reason for its actions—that petitioner admitted he was not fit to drive and that the Postal Service's psychiatrist had determined that petitioner was unfit to drive. *Id.* at 21-22. In

addition, the court ruled that petitioner failed to "allege or present evidence that he was treated less favorably than other nonwhite, nonJewish employees." *Id.* at 22

3. In an unpublished, per curiam opinion, the court of appeals affirmed. Pet. App. 1.

ARGUMENT

Petitioner contends (Pet. 6-14) that review is warranted because the Fifth Circuit has adopted an ultimate employment decision standard that conflicts with the standard adopted by other circuits for determining whether conduct violates Title VII's discrimination and anti-retaliation prohibitions. That contention should be rejected; the court of appeals' unpublished summary affirmance does not merit further review in this Court.

The court of appeals' unpublished decision in this case did not turn on the application of the ultimate employment decision test. Rather, the court of appeals merely affirmed without any explanation a district court judgment in favor of the Postal Service on petitioner's claims. The district court did refer to the ultimate employment decision standard. See Pet. App. 19. But the district court did not dispose of this case based on that standard.

The district court dismissed some of petitioner's claims on grounds that do not implicate the standard for determining what constitutes an adverse employment action. The district court dismissed petitioner's claims stemming from his first two EEO complaints on statute of limitations grounds. Pet. App. 15. Among the claims dismissed on statute of limitations grounds was petitioner's claim that the Postal Service retaliated against him by denying his transfer request. The question whether the denial of such a request constitutes an ad-

verse employment action is therefore not presented here.

The district court dismissed petitioner's claims relating to the temporary suspension of his driving duties and the requirement of an additional fitness-for-duty exam because the record established that the Postal Service took those actions for legitimate, nondiscriminatory reasons, not because they did not constitute adverse employment actions. Pet. App. 21-22. This case therefore does not present the question whether those actions are sufficiently adverse to constitute actionable discrimination or retaliation under Title VII.

That leaves only petitioner's claims relating to the threat to have security remove him from the building, the delay in reactivating his badge, the warning that he would be sent home early from work, and the notation that his medical appointment was rescheduled for petitioner's personal convenience. In analyzing those claims, the district court referred to the ultimate employment decision standard, but it did not rest its analysis on that standard. Rather, it concluded that those actions did not constitute adverse actions for Title VII purposes because they had no effect on petitioner's "employment conditions or status." Pet. App. 19-20.

Insofar as the court disposed of petitioner's outright *discrimination* (as opposed to retaliation) claims on that basis, the district court's action was entirely appropriate. To establish actionable discrimination, a plaintiff must demonstrate a change in compensation, or in the terms, conditions, or privileges of employment. 42 U.S.C. 2000e-2(a)(1). A plaintiff who fails to demonstrate an effect on "employment conditions or status" fails to make that showing. No circuit has taken a contrary view on that threshold issue.

In *Burlington Northern & Sante Fe Railway* v. *White*, 126 S. Ct. 2405, 2412-2413 (2006), the Court held that Title VII's anti-retaliation prohibition is not limited to employment actions that affect the terms and conditions of employment. Rather, the anti-retaliation prohibition extends to any action that a "reasonable employee would have found" to be "materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 2415 (internal quotation marks and citation omitted).

This case, however, need not be vacated and remanded for reconsideration in light of *Burlington Northern*. Petitioner has not argued that the decisions below improperly limited consideration of his *retaliation* claim to employment actions that affect the terms or conditions of employment. Rather, petitioner's claim is that the actions about which he complained all involved employment actions that affected the terms and conditions of his employment. See Pet. 12-13. The courts below correctly rejected that claim, and nothing in *Burlington Northern* calls that fact-bound determination into question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2006